Supreme Court, U.S.
FILED
JUN 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-996

In the Supreme Court of the United States

OCTOBER TERM, 1988

COIT INDEPENDENCE JOINT VENTURE, PETITIONER

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR FIRSTSOUTH, F.A.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY OF THE FEDERAL HOME LOAN BANK OF DALLAS, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, AND FEDERAL HOME LOAN BANK OF TOPEKA TO PETITIONER'S OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

KENNETH S. GELLER
KATHRYN A. OBERLY
Counsel of Record
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

HARVEY SIMON
General Counsel
Federal Home Loan Bank of Dallas
Irving, Texas 75062

WILLIAM K. BLACK
General Counsel
Federal Home Loan Bank of San Francisco
San Francisco, California 94120

BRIAN C. MCCORMALLY
General Counsel
Federal Home Loan Bank of Topeka
Topeka, Kansas 66603

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY OF THE FEDERAL HOME LOAN BANK OF DALLAS, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, AND FEDERAL HOME LOAN BANK OF TOPEKA TO PETITIONER'S OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Petitioner advances two grounds in opposition to the Motion of the Federal Home Loan Banks of Dallas, San Francisco, and Topeka for Leave to File Brief as Amici Curiae. As we demonstrate below, neither point has merit.

1. Petitioner first contends that the Banks' motion is untimely, because counsel for the Banks did not seek petitioner's consent until June 20, 1988. Petitioner admits, however, that the Banks' motion and proposed brief were timely filed on June 17, 1988. More importantly, petitioner's opposition surely cannot be read as suggesting that petitioner would have consented to the Banks' filing had such consent been requested on June

17, 1988; indeed, petitioner's second argument against the Banks' filing—that the Banks are federal instrumentalities and ought to be represented by the Solicitor General—clearly indicates that petitioner would have opposed the Banks' request for consent regardless of the date on which it was sought.[1]

We note also that the Banks' counsel did not seek petitioner's consent prior to June 20 because it was not until June 16, 1988, the day before the proposed brief was due for filing, that the Banks decided that they might wish to file a brief. The Banks' counsel accordingly determined that the Banks would proceed by motion rather than attempt to obtain the parties' consent at the last moment. The motion and accompanying brief were timely filed on June 17, 1988.

Thereafter, the Banks' counsel contacted petitioner's counsel on June 20, 1988, *at the request of the Clerk's Office*. That request was made in an attempt to obviate the need for burdening this Court with consideration of a motion for leave to file a brief that was timely tendered to the Clerk's Office. The Clerk's Office advised the Banks' counsel that "after-the-fact" consent would be acceptable. Significantly, the Banks' counsel contacted counsel for the respondent at the same time and, in response, received the Solicitor General's written consent to the filing of the Banks' proposed brief. The fact that petitioner's counsel chose to refuse consent—and apparently would have done so whenever it might have been requested—does not render the Banks' motion and proposed brief untimely.

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[1] In any event, petitioner's consent now *has* been refused, as petitioner contends is required by Rule 36 of the Rules of this Court, and the Banks' motion was timely filed. Thus, petitioner's only real objection is that the Banks' motion as filed on June 17 did not state that consent had been refused. The motion has since been corrected to indicate that consent has been refused.

2. Petitioner's second argument is that the Banks are "instrumentalities of the federal government," whose interests "are already represented by the Solicitor General" (Pet. Objection at 3). This argument is misguided. Although the Banks are federal instrumentalities, their stock is entirely owned by private member institutions. 12 U.S.C. 1426; S. Rep. No. 778, 87th Cong., 1st Sess. (1961), *reprinted in* 1961 U.S. Code Cong. & Admin. News 2610, 2611. A majority of the Banks' directors are chosen by these private member institutions (12 U.S.C. 1427), and none of the Banks' directors or employees are on the federal payroll. Moreover, the Banks themselves are enormous commercial enterprises with substantial financial interests at stake in FSLIC receivership proceedings. (The Banks' structure and functions are explained in more detail in their motion, which is bound with their proposed brief.) The Banks are thus materially different from federal agencies, and the Solicitor General's responsibility for presenting the views of the federal government in this case (see 28 U.S.C. 518(a)) does not extend to representation of the Banks. The Solicitor General has recognized as much by giving his written consent to the filing of the Banks' brief.

In addition, the Banks' ability to represent their own interests is supported by their long history of independent representation in this Court. For example, the Federal Home Loan Bank of Los Angeles was represented by private counsel in *Fahey* v. *Mallonee*, 332 U.S. 245 (1947), and the Federal Home Loan Bank of San Francisco was represented by private counsel in *Mallonee* v. *Federal Home Loan Bank of San Francisco*, No. 611 (Br. in Opp. filed Feb. 1, 1956); *Long Beach Fed'l Savings & Loan Ass'n* v. *Federal Home Loan Bank of San Francisco*, No. 731 (Mot. to Dismiss filed Mar. 27, 1956); and *Fidelity Financial Corp.* v. *Federal Home Loan Bank of San Francisco*, No. 86-696 (Br. in Opp. filed

Jan. 6, 1987).[2] The Solicitor General appeared on behalf of the Federal Home Loan Bank Board and its members in all but the *Fidelity Financial* case, to which the Bank Board was not a party. Thus, there is a long-standing history of side-by-side appearances by the Solicitor General on behalf of the Bank Board and private counsel on behalf of the Banks.

Finally, as petitioner itself acknowledges (Pet. Objection at 2-3), the Banks' need for separate representation in this case is readily apparent from a comparison of the brief filed by the Solicitor General with the Banks' proposed brief. Although the Banks have endorsed portions of the Solicitor General's arguments in this case, they also have advanced arguments that the Solicitor General has chosen not to present. Contrary to petitioner's argument, however, the Banks' additional arguments do not impose any extra burden on petitioner. The position espoused by the Banks is the same as that adopted by the court of appeals, and thus it is the position that petitioner has been prepared to address from the outset of this litigation. Moreover, the argument advanced by the Solicitor General leaves this Court in the position of having to decide this case without benefit of a brief that fully defends the court of appeals' judgment. The Banks' brief, by contrast, provides the Court with the adversary presentation of views so necessary to this Court's decisionmaking process.

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[2] The Federal Reserve Banks, which operate pursuant to a statutory scheme similar to that of the Federal Home Loan Banks, also have appeared in this Court through privately-retained counsel. See *The Chase Manhattan Bank, N.A.* v. *Vishipco Line*, No. 81-1591 (Br. of Federal Reserve Bank of New York as Amicus Curiae filed Mar. 27, 1982). Notably, the Solicitor General appeared not on behalf of the Federal Reserve Bank, but instead to present the views of the United States. See *ibid.* (Br. for the United States as Amicus Curiae filed Oct. 6, 1982).

In sum, because the Banks are not federal agencies, because they have always been represented by privately-retained counsel in this Court, because the Solicitor General has chosen not to fully defend the court of appeals' judgment in this case, and because the Solicitor General has consented to the Banks' filing of a separate brief, petitioner's opposition to the Banks' Motion for Leave to File Brief as Amici Curiae should be rejected.

Respectfully submitted.

KENNETH S. GELLER
KATHRYN A. OBERLY
Counsel of Record
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

HARVEY SIMON
General Counsel
Federal Home Loan Bank of Dallas
Irving, Texas 75062

WILLIAM K. BLACK
General Counsel
Federal Home Loan Bank of San Francisco
San Francisco, California 94120

BRIAN C. MCCORMALLY
General Counsel
Federal Home Loan Bank of Topeka
Topeka, Kansas 66603

June 29, 1988